

BEFORE THE
Federal Communications Commission
 WASHINGTON, D.C.

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 99-170
Table of Allotments)	RM-9545
FM Broadcast Station)	
(Oceanside, California and)	
Encinitas, California))	

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

To: Chief, Allocations Branch
 Policy and Rules Division
 Mass Media Bureau

COMMENTS IN SUPPORT OF NOTICE OF PROPOSED RULEMAKING

Compass Radio of San Diego, Inc. ("Compass"), licensee of FM broadcast station KXST, Oceanside, California ("KXST"), by its attorneys, hereby comments in support of the Commission's Notice of Proposed Rulemaking ("Notice"), in which the Commission proposes to amend its FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to reallocate Channel 271B from Oceanside to Encinitas, California, and to modify KXST's license accordingly.^{1/}

I. PRELIMINARY STATEMENT

1. Compass filed a Petition for Rule Making ("Petition") on January 14, 1999, requesting that the Commission amend its FM Table of Allotments by reallocating Channel 271B from Oceanside to Encinitas, California, as that community's first local service, and to modify KXST's license accordingly to specify Encinitas as its community of license.

^{1/} Since these Comments are being filed before the July 6, 1999 deadline for Comments, they are timely filed.

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2. On May 14, 1999, the Commission released its Notice in the above-referenced matter, proposing to amend its FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Oceanside, California	271B	--
Encinitas, California	--	271B

In connection with this reallocation the FCC also proposed to modify KXST's license accordingly. The Commission noted that reallocating Channel 271B to Encinitas would provide that community with its first local service, while Oceanside would continue to receive local service from full-time, non-commercial AM broadcast station KKSM.

3. The Commission conditioned the final outcome of this proceeding on its re-examination of certain policies under Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992) ("Newnan").^{2/} Under Newnan, the Commission established a policy that allowed grandfathered short-spaced stations, notwithstanding the requirement that any proposed reallocation must meet the minimum distance separation requirements as set forth under Section 73.207 of the Commission's Rules, to relocate to a new community of license as long as no

^{2/} In the Notice, the Commission indicated that in three earlier proceedings it sought comment on whether the Newnan policy should continue to be valid and whether it should be extended to post-1964 FM stations that are not now in conformity with current spacing requirements. Based upon a review of the Commission records, it appears the three proceedings in which the Commission sought comment on Newnan are: Fremont and Holton, Michigan, DA 98-1956, MM Dckt. No.98-180 (released October 2, 1998); ("Fremont") Killeen and Cedar Park, Texas, DA 98-1939, MM Dckt. No. 98-176 (released September 25, 1998) ("Killeen"); and Sugar Hill and Toccoa, Georgia, DA 98-1785, MM Dckt. No. 98-162 (released September 11, 1998) ("Sugar Hill") (collectively, these three shall be referred to as the "Newnan Proceedings"). Notice at ¶ 6.

change to the technical facilities was involved. Because no technical changes would occur, no existing grandfathered short spacings would be affected and no new short spacings would be created. Therefore, the Commission reasoned, because no new interference would be created, grandfathered stations should have the same opportunity to change their community of licenses. As Compass acknowledged in its Petition, it is short-spaced, on a pre-1964 grandfathered basis, to KGB-FM, Channel 268B, San Diego, California, a third-adjacent channel short-spacing, and to KSCA(FM), Channel 270B, Glendale, California, a first-adjacent channel short-spacing. However, the Commission eliminated the third-adjacent channel spacing requirements for grandfathered short-spaced stations in its Report and Order, 8 CR 1238 (1997). Therefore, the short-spacing that exists between KXST and KGB-FM should not be a factor in this reallocation proceeding. In addition, because Compass' proposal does not involve any change in the station's technical facilities, it complies with the requirements set forth in Newnan and, accordingly, the short-spacing to KSCA(FM) should not be a consideration.

4. The Commission agreed with Compass' Petition by tentatively adopting the KXST reallocation proposal and by proposing to modify KXST's license accordingly. It noted that Encinitas was a community deserving of a first local service. Further, the Commission held that because both Oceanside and Encinitas are already located in the San Diego Urbanized Area, Compass would not have to submit additional information to show whether Encinitas is independent of San Diego to merit a first local service preference. See Faye and Richard Tuck, 3 FCC Rcd 5374 (1988). Therefore, based upon Compass' compliance with the Commission requirements for a community reallocation, the FCC's proposal to reallocate Channel 271B to Encinitas and to modify KXST's license should be promptly finalized.

ARGUMENT

5. Compass strongly urges the Commission to uphold the policy of reallocation flexibility for grandfathered short-spaced stations set forth in Newnan, and to do so in an expeditious manner. Because such grandfathered stations, like KXST, were in compliance with the Commission's Rules when authorized, they should be allowed the same opportunity to change their community of license, just like any other station authorized in accordance with the Commission's Rules. Further, when no transmitter site change is proposed, as is the case in this Petition, no additional interference or short-spacings will be involved. Therefore, the public interest would not be harmed by the relocation. To the contrary, as demonstrated in the Petition and in this Notice, the public interest will actually be better served by the reallocation, as it allows Encinitas to have a first local transmission service in furtherance of the Commission's preferential arrangement of FM allotments.^{3/}

6. Compass supports those comments filed in the Newnan Proceedings attesting to the continued validity of Newnan.^{4/} The various reasons given for continuing to follow Newnan may be summarized as follows:

^{3/} Under the Commission's allotment criteria, priority for service is in the following order: (1) provision for first full-time aural reception service; (2) provision for second full-time aural reception service; (3) provision for first local transmission service; and (4) provision for other public interest factors. Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870, 4873 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990)

^{4/} Based on a review of the Commission records, comments and reply comments were filed by the following parties in the following proceedings: Fremont (Fuller-Jeffrey Radio of New England, Inc. ("Fuller") and Noordyk Broadcasting, Inc.); Killeen (Fuller, Gulfstar Communications Killeen License, Inc., LBSJ Broadcasting Company, L.P. ("LBSJ"), and Texas Star Radio, Inc.); and Sugar Hill (Fuller, Southern Broadcasting of Pensacola, Inc., El Dorado Communications, Inc., and LBSJ).

- In reallocation cases involving grandfathered short-spaced stations which propose no technical changes, no injury would be caused either to other stations, to the integrity of the FM band, or to the listening public. Therefore, a station should have the same flexibility to modify its facilities to specify a new community of license as is afforded to a non short-spaced station.
- The flexibility established in Newnan allows genuine improvements upon the status quo. The new allotment is almost always an allotment to a community with a greater need for service under the Commission's allotment priorities. Therefore, applying the community reallocation rules to short-spaced stations, when those reallocations do not exacerbate any existing short-spacings or create new ones, fulfills the goal of a "fair, efficient, and equitable distribution of radio service" as mandated by the Communications Act of 1934, as amended. 47 U.S.C. § 307(b) (1998).
- The Commission has waived strict application of its Section 73.207 short-spacing rules in other allotment contexts. See East Los Angeles, Long Beach and Frazier Park, California, 10 FCC Rcd 2864 (M. Med. Bur. 1995) (allowing a grandfathered short-spaced station to change community of license and transmitter location, because there was no increase in interference potential, and there would be an increase in the number of persons served); St. Augustine, St. Augustine Beach, and Gainesville, Florida, 7 FCC Rcd 7657 (M. Med. Bur. 1992) (allowing a station short-spaced to a third-adjacent channel to change its operation to a second-adjacent channel, as the protection afforded to the short-spaced station would remain the same and no additional interference would be created.) Based on these cases, it would be arbitrary and capricious for the Commission to attempt to prevent a short-spaced allotment at one community as opposed to another, when no change in the technical facilities is proposed, and where it has previously permitted a reallocation where a facility change was involved. See Comments of LBSJ, filed in MM Docket 98-176, RM-9363, at 5-6 (filed November 16, 1998).
- While it is possible that a licensee, which changes its community of license, may at some point in the future seek to modify its technical facilities, such speculation is never legally relevant and should not be considered in reallocation proceedings. Comments of LBSJ, filed in MM Docket 98-176, RM-9363, at 7 (filed November 16, 1998)(citing Warrenton and Enfield, North Carolina, DA 98-1945 (released July 31, 1998)).^{5/} In any event, if a facility change is filed by a party, the Commission is fully capable of conducting a public interest determination based on the facts then presented.

^{5/} In that case, the FCC rejected the speculative concern expressed by one party that the proposed reallocation was intended to allow the Petitioner's station to enter the Richmond Urbanized Area for the first time. In this proceeding, the Petitioner's station is already licensed to a community within the San Diego Urbanized Area, thereby providing not even a basis for such a speculative concern.

7. No comments were filed in the Newnan Proceedings that suggest that the Commission should either abolish the reallocation policy set forth in Newnan, or narrow its current application. In fact, two parties, LBJS Broadcasting Company, L.P. ("LBJS") and Texas Star Radio, Inc. ("TSR") filed comments urging the Commission to extend the Newnan policy to post-1964 short-spacings. See Comments of LBJS and TSR filed in MM Docket No. 98-176, RM-9363 (filed November 16, 1998). In short, then, nothing has been filed with the Commission that provides a valid basis for overturning Newnan.

8. Compass echoes the reasons provided in the comments and reply comments in the Newnan Proceedings in favor of continued adherence to Newnan. The Commission must not lose sight of the fact that the reallocation of short-spaced stations can provide a strong benefit to the public -- first local service as here -- without causing any harm or interference to other stations or to the listening audience. Therefore, the rationale set forth by the Commission in Newnan remains valid.

9. At the very least, because Compass filed its Petition in good faith reliance on the Newnan precedent, any change made by the Commission in Newnan should not be applied retroactively. Such application would be severely prejudicial to the time and effort spent by Compass in preparing and prosecuting its community reallocation request.

DECLARATION OF INTENT

If the proposal set forth in the Notice is adopted, Compass intends to promptly file the appropriate application for Channel 271B at Encinitas, California. Since no change in the technical facilities of KXST is proposed, no commitment regarding construction is required.

CONCLUSION

For the foregoing reasons, Compass Radio of San Diego, Inc. respectfully requests the Commission to promptly reallocate Channel 271B from Oceanside, California to Encinitas, California and to modify the license of radio station KXST-FM accordingly.

Respectfully submitted,

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